not limit its application to only new drugs or vaccines used in a pandemic context. Instead, it applies to any ''drug, biological product or device'' that is used to treat or cure a pandemic, epidemic or limit the harm that a pandemic or epidemic might cause. As drafted, this legislation would include drugs such as Tylenol or Advil.

Finally, the conference report falsely claims to establish a compensation process. This ''compensation process'', under the sole direction of the Secretary of HHS, is governed by regulations created by the Secretary alone and includes caps on compensation awards. Further, no monies have been appropriated for the fund and consequently, the ''compensation process'' is whole inoperable. The provision has no true compensation program.

Attached to my statement is a letter from Professor Erwin Chemerinsky, Alston & Bird Professor at the Duke University School of Law which further outlines the problems and issues concerning this preparedness provision. Instead of putting the burden on the victim by cutting compensation and protecting the drug manufacturers, we must ensure corporate accountability and protection for our citizens. I strongly urge a ''no'' vote.

ALSTON & BIRD PROFESSOR OF LAW AND POLITICAL SCIENCE, DUKE UNIVERSITY SCHOOL OF LAW,
December 20, 2005.

DEAR SENATOR: I understand that the Congress is considering legislation that has been denominated as the ''Public Readiness and Emergency Preparedness Act.'' This legislation would give the Secretary of Health and Human Services extraordinary authority to designate a threat or potential threat to health as constituting a public health emergency and authorizing the design, development, and implementation of countermeasures, while providing total immunity for liability to all those involved in its development and administration. In addition to according unfettered discretion to the Secretary to grant complete immunity from liability, the bill also deprives all courts of jurisdiction to review those decisions. Sec. (a)(7). I write to alert the Congress to the serious constitutional issues that the legislation raises.

First, the bill is of questionable constitutionality because of its broad, unfettered delegation of legislative power by Congress to the executive branch of government. Under the nondelegation doctrine, Congress may provide another branch of government with authority over a subject matter, but ''cannot delegate any part of its legislative power except under the limitation of a prescribed standard.'' United States v. Chicago, M., St. P. & P.R. Co., 282 U.S. 311, 324 (1931). Recently, the Supreme Court endorsed Chief Justice Taft's description of the doctrine: ''the Constitution permits only those delegations where Congress 'shall lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform.' '' Clinton v. City of New York, 524 U.S. 417, 484 (1998)(emphasis in original), quoting J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928). The breadth of authority granted the Secretary without workable guidelines from Congress appears to be the type of ''delegation running riot'' that grants the Secretary a ''roving commission to inquire into evils and upon discovery correct them'' of the type condemned by Justice Cardozo in A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 553 (1935)(Cardozo, J., concurring).

Second, the bill raises important federalism issues because it sets up an odd form of federal preemption of state law. All relevant state laws are preempted. Sec. (a)(8). However, for the exttemely narrow instance of willful (knowing) misconduct by someone in the stream of commerce for a countermeasure the bill establishes that the substantive law is the law of the state where the injury occurred, unless preempted. Sec. (e)(2). The sponsors appear to be trying to have it both ways, which may not be constitutionally possible. The bill anticipates what is called express preemption, because the scope of any pennissible lawsuits is changed from a state-based to a federally based cause of action. See Beneficial Nat'l Bank v. Anderson, 539 U.S. 1, 8 (2003).

Usually, that type of ''unusually 'powerful' '' preemptive statute provides a remedy for any plaintiff's claim to the exclusion of state remedies. Id. at 7 (citation omitted). Here, rather than displace state law in such instances, the bill adopts the different individual laws of the various states, but amends them to include a willful misconduct standard that can only be invoked if the Secretary or Attorney General initiates an enforcement action against those involved in the countermeasure and that action is either pending at the time a claim is filed or concluded with some form of punishment ordered.

Such a provision raises two important constitutional concerns. One problem is that this hybrid form of preemption looks less like an attempt to create a federal cause of action than an direct attempt by Congress to amend state law in violation of Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938) and basic principles of federalism. Although Congress may preempt state law under the Supremacy Clause by creating a different and separate federal rule, see *Crosby v. Nat'l Foreign Trade Counc.,* 530 U.S. 363, 372 (2000), it may not directly alter, amend, or negate the content of state law as state law. That power, the Erie Court declared, ''reserved by the Constitution to the several States.'' 304 U.S. at 80. It becomes clear that the bill attempts to amend state law, rather than preempt it with a federal alternative, when one realizes that States will retain the power to enact new applicable laws or amend existing ones with a federal overlay that such an action may only be commenced in light of a federal enforcement action and can only succeed when willful misconduct exists. The type of back and forth authority between the federal and state governments authorized by the bill fails to constitute a form of constitutionally authorized preemption.

The other problem with this provision is that the unfettered and unreviewable discretion accorded the Secretary or Attorney General to prosecute an enforcement action as a prerequisite for any action for willful misconduct violates the constitutional guarantee of access to justice, secured under both the First Amendment's Petition Clause and the Fifth Amendment's Due Process Clause. See *Christopher* v. *Harbury,* 536 U.S. 403, 415 n. 12 (2002). In fact, the Court has repeatedly recognized that that ''the right of access to the courts is an aspect of the First Amendment right to petition the Government for redress of grievances.'' *Bill Johnson's Restaurants* v. *NLRB,* 461 U.S. 731. 741 (1983), citing *California Motor Transport Co* . v. *Trucking Unlimited,* 404 U.S. 508, 510 (1972). First Amendment rights, the Supreme Court has said in a long line of precedent, cannot be dependent on the ''unbridled discretion'' of government officials or agencies. See, e.g., *City of Lake wood* v. *Plain Dealer Pub. Co.,* 486 U.S. 750, 757 (1988). At the same time, the Due Process Clause guarantees a claimant an opportunity to be heard ''at a meaningful time and in a meaningful manner.'' *Armstrong v. Manzo,* 380 U.S. 545, 552 (1965). The obstacles placed before a claimant, including the insuperable one of inaction by the Secretary or Attorney General, raise significant due process issues. The Supreme Court has recognized that official inaction cannot prevent a claimant from being able to go forth with a legitimate lawsuit. See *Logan* v. *Zimmerman Brush Co.,* 455 U.S. 422 (1982). The proposed bill seems to reverse that constitutional imperative.

Third, the complete preclusion of judicial review raises serious constitutional issues. The Act, through Sec. 319F–3(b)(7), expressly abolishes judicial review of the Secretary's actions, ordaining that ''[n]o court of the United States, or of any State, shall have subject matter jurisdiction,'' i.e., the power, ''to review . . . any action of the Secretary regarding'' the declaration of emergencies, as well as the determination of which diseases or threats to health are covered, which individual citizens are protected, which geographic areas are covered, when an emergency begins, how long it lasts, which state laws shall be preempted, and when or if he shall report to Congress.

The United States Supreme Court has repeatedly stressed that the preclusion of all judicial review raises ''serious questions'' concerning separation of powers and due process of law. See, e.g., *Johnson* v. *Robison,* 415 U.S. 361 (1974); see also, Oestereich v. Selective Service System Local Board No. 14, 393 U.S. 233 (1968); *McNary* v. *Haitian Refugee Center, Inc.,* 498 U.S. 479 (1991); *Reno* v. *Catholic Social Services,* 509 U.S. 43 (1993). Judicial review of government actions has long regarded as ''an important part of our constitutional traditional'' and an indispensable feature of that system,'' *Lehnhausen* v. *Lake Shore Auto Parts Co.,* 410 U.S. 356, 365 (1973).

The serious constitutional issues raised by this legislation deserve a full airing and counsels against any rush to judgment by the Congress. Whatever the merits of the bill's purposes, they may only be accomplished by consideration that assures its constitutionality .

ERWIN CHEMERINSKY.

UNITED STATES-BAHRAIN FREE TRADE AGREEMENT IMPLEMENTATION ACT (H.R. 4340)

HON. BETTY McCOLLUM

OF MINNESOTA

IN THE HOUSE OF REPRESENTATIVES

Thursday, December 22, 2005

Ms. McCOLLUM of Minnesota. Mr. Speaker, I rise in strong opposition to the United States-Bahrain Free Trade Agreement Implementation Act (H.R. 4340).

The Kingdom of Bahrain has been an American ally in the Persian Gulf for decades, and I support expanding opportunities for trade between our nations. Trade is a valuable tool to strengthen America's global partnerships and advance a higher quality of life at home and abroad. The U.S.-Bahrain Free Trade Agreement, however, does not pursue trade that is free and fair. Rather, it expands a system of globalization that benefits large multinational corporations at the expense of working people and their families.

Under this free trade agreement, Bahrain is only required to comply with its domestic labor laws, which do not need to be consistent with international recognized labor rights. As a result, workers can be denied their right to organize and bargain collectively and have no guarantee of freedom from child labor, forced

labor, and discrimination. In turn, the playing field for U.S. workers and goods produced in the U.S. must be lowered to compete with the current standards of our trading partner.

This Congress knows better. Just four years ago, this House passed a free trade agreement with another country in the Middle East, Jordan, by voice vote. The U.S.-Jordan Free Trade Agreement affirmed the rights of workers and explicitly stated that it was ''inappropriate to encourage trade by relaxing domestic labor laws.'' It is extremely disappointing that the agreement before us today could not live up to this standard and do more to protect the rights of workers.

The U.S.-Bahrain free trade agreement also fails on environmental protection. Under this agreement, the labor and environmental dispute process is inferior to that provided for commercial provisions. Monetary fines for environmental and labor violations are capped at $15 million. This amount is lower than that for commercial violations and likely too low to deter the most severe violations.

This free trade agreement also undermines the quality of life of working families in other ways. It extends patent protection for pharmaceutical companies, extending the time before generic drugs may enter the market. This denies working families affordable access to the prescription drugs they need, to the benefit of already successful drug companies.

For these reasons, I oppose this free trade agreement and encourage my colleagues to vote against this legislation.

NESsT SOCIAL ENTERPRISE COMPETITION FOR CENTRAL & EASTERN EUROPE

TOM LANTOS

OF CALIFORNIA

IN THE HOUSE OF REPRESENTATIVES

Thursday, December 22, 2005

Mr. LANTOS. Mr. Speaker, I invite my colleagues to join me in recognizing an important competition that will take place in early 2006 in Croatia, the Czech Republic, Hungary and Slovakia.

The regional Social Enterprise Competition for Central & Eastern Europe is sponsored by the Nonprofit Enterprise and Self-sustainability Team (NESsT). The competition will bring together social entrepreneurs and local civil society organizations to submit proposals for achieving greater financial sustainability through social enterprise. The mission of this competition merits the attention of my colleagues in the House because it is inextricably linked to the role of civil society organizations as advocates for freedom, human rights and public welfare in emerging democracies.

Mr. Speaker, I am certain that all of us remember the euphoria that accompanied the collapse of the Berlin Wall and the demise of communism just a decade and a half ago. With Members of this House and people around the world, I recall the joy of seeing democracy and human rights restored to long-suffering peoples of Central Europe and the former Soviet Union. I remember watching in amazement as Berliners from both halves of the divided city danced on the Berlin Wall. I joined people from around the world as we chipped a piece from that disappearing Wall. I was with the Czech students celebrating in the streets of Prague.

The struggle for democracy and human rights is far from over in this region and elsewhere in the world. As the United States strives to help emerging democracies such as Ukraine, Georgia, and Afghanistan, efforts by NESsT and other non-governmental organizations (NGOs) through activities such as the social enterprise competition are critical in helping to promote the rights and interests of the public in emerging democracies.

Mr. Speaker, Central and Eastern Europe received an enormous amount of foreign assistance throughout the 1990s, which assisted former communist countries to transition to more open and democratic societies. However, in recent years, this region has seen significant cuts in U.S. foreign assistance. Despite these cuts in funding, the needs of civil society organizations in this region continue to grow.

The limits on democratic development assistance in Central and Eastern Europe resulted in some serious questions about the viability of civil society organizations to assist in democratic development. What role should social enterprise play in encouraging growth, upholding worker rights, and protecting natural resources? What role can civil society organizations play in democratic development if they are beholden to the whims of foreign donors? NGOs, such as NESsT, have found innovative and cost-efficient ways to strengthen the financial sustainability of civil society organizations working for social change and development in emerging market countries.

The NESsT-sponsored competition seeks to expand the network of financially sustainable civil society organizations throughout the region. Through the competition, NESsT will apply a venture capital approach, also known as venture philanthropy, to providing the financial and technical support to the region's civil society organizations.

Mr. Speaker, venture philanthropy involves applying the tools of the for-profit sector to expand the reach of the community organizations. Venture philanthropists often offer loans and equity equivalents rather than traditional donations; engage nonprofit managers with an array of technical and strategic advisory service; build organizational capacity through the development of skills and networks; and, most important of all, set clear performance goals and expect ''portfolio members'' to achieve concrete social and/or financial returns on investment.

I would like to pay tribute to the principal sponsor of the competition, the Nonprofit Enterprise and Self-Sustainability Team (NESsT). From its offices in Budapest and Santiago, this organization has emerged as an international leader in the effort to foster social entrepreneurship and venture philanthropy in developing nations. NESsT's co-founders, Nicole Etchart and Lee Davis, direct initiatives that clearly address the challenges and needs of NGOs in Central Europe and Latin America.

Mr. Speaker, for all these reasons and many more, I urge my colleagues to join me in recognizing the important mission of the Social Enterprise Competition for Central and Eastern Europe and the outstanding contributions of its principal sponsor, the Nonprofit Enterprise and Self-Sustainability Team.

CONFERENCE REPORT ON H.R. 2863, DEPARTMENT OF DEFENSE APPROPRIATIONS ACT, 2006

SPEECH OF

HON. EARL POMEROY

OF NORTH DAKOTA

IN THE HOUSE OF REPRESENTATIVES

Sunday, December 18, 2005

Mr. POMEROY. Mr. Speaker, I rise to say that although I will be voting for H.R. 2863, I would like to express my disappointment about several of the provisions in the Act. These extraneous provisions should not have been included in this important bill that is helping to fund and support our troops.

First, I am concerned about the inclusion of aid for students displaced by Hurricane Katrina both procedurally and substantively. While I believe that schools serving displaced students must be reimbursed for educational expenses associated with these students as soon as possible, I am concerned that the system in this bill will create a continuing voucher system, which will not be in the best interest for teachers, students, or parents. I am not satisfied that this program will provide the best relief for students and it is my hope that the program will only be utilized in this emergency time and will sunset as provided next August.

I am also concerned about the 1 percent across the board cut contained in the bill. This cut will reduce defense spending by $4 billion. These cuts will affect funding of important homeland security programs, such as the Customs and Border Patrol and Immigration and Customs Enforcement, education programs including No Child Left Behind, and FBI funding, including a reduction of new hires for the counterintelligence/counterterrorism department.

I am disappointed in both of the above provisions, which I feel should have been considered separately. For this reason, I voted against the rule that allowed these provisions to be permitted for consideration in the Defense Appropriations bill.